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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Z.F. MICRO SOLUTIONS, INC, et. al., Plaintiffs and Appellants, v. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, Defendants and Respondents.	H034513 (Santa Clara County Super. Ct. No. 017803)

Appellants Z.F. Micro Solutions, Inc. (ZF Micro) and its president, David Feldman, sued their liability insurers, Certain Underwriters at Lloyd's, London (Underwriters), when Underwriters refused to defend and indemnify them against a cross-complaint by a third party. The superior court granted Underwriters summary judgment based on appellants' untimely notice of the third party's claim. Appellants assert error, contending that the policy provision requiring notice within a certain period was not conspicuous and therefore should not be enforced. We conclude that the order, construed to incorporate a judgment, must be upheld.

Background

Appellants' policy with Underwriters included a "Directors & Officers and Assured Organization Coverage" section with an aggregate limit of liability of $3 million. The policy covered the period from November 23, 2001 to July 1, 2002.

The first two pages, "DECLARATIONS," summarized the basic terms, such as who was covered for what period, limits of liability, retention, deductible, and premium. The first paragraph, in boldface, capital letters, stated: "EACH OF THE COVERAGE SECTIONS OF THIS CERTIFICATE (EMPLOYMENT PRACTICES, DIRECTORS & OFFICERS AND ASSURED ORGANIZATION, FIDUCIARY, AND MISCELLANEOUS PROFESSIONAL SERVICES, WHICHEVER ARE APPLICABLE) IS WRITTEN ON A CLAIMS-MADE BASIS. EXCEPT AS OTHERWISE PROVIDED, THESE COVERAGE SECTIONS COVER ONLY ANY CLAIM FIRST MADE AGAINST THE ASSURED DURING THE CERTIFICATE PERIOD. THE CRIME COVERAGE SECTION, IF APPLICABLE, APPLIES ONLY TO LOSS OCCURRING DURING THE CERTIFICATE PERIOD."

The ensuing pages consisted of "GENERAL TERMS AND CONDITIONS" and four coverage sections: "EMPLOYMENT PRACTICES COVERAGE SECTION"; "DIRECTORS & OFFICERS AND ASSURED ORGANIZATION COVERAGE SECTION"; "FIDUCIARY COVERAGE SECTION"; and "CRIME COVERAGE SECTION." Each section had its own insuring clauses, a list of definitions, a description of exclusions, a subsection addressing limits of liability and retentions, and a notification provision.[1] All of the paragraphs within each of those coverage sections bore their titles in capital letters.

The Directors & Officers and Assured Organization Coverage Section, for example, set forth its insuring clauses as follows: "A. INSURING CLAUSES [¶] 1. Underwriters shall pay on behalf of the Directors and Officers Loss resulting from any Claim first made against the Directors and Officers during the Certificate Period for a Wrongful Act. [¶] 2. Underwriters shall pay on behalf of the Assured Organization Loss

[1] The Crime Coverage section included several additional paragraphs.

which the Assured Organization is required or permitted to pay as indemnification to any of the Directors and Officers resulting from any Claim first made against the Directors and Officers during the Certificate Period for a Wrongful Act. [¶] 3. Underwriters shall pay on behalf of the Assured Organization Loss resulting from any Claim first made against the Assured Organization during the Certificate Period for a Wrongful Act."

The notification provision for "Directors & Officers and Assured Organization" was on page four of this coverage section. Paragraph E stated: "E. NOTIFICATION [¶] 1. The Assureds shall, as a condition precedent to their rights to payment under this Coverage Section only, give Underwriters notice in writing of any written Claim as soon as practicable, but in no event later than 60 days after the end of the Certificate Period. [¶] 2. If, during the Certificate Period or the Optional Extension Period, any of the Assureds first becomes aware of a specific Wrongful Act and if the Assureds, during the Certificate Period or the Optional Extension Period, if purchased, give written notice to Underwriters as soon as practicable of: [¶] (a) the specific Wrongful Act, and [¶] (b) the consequences which have resulted or may result therefrom, and [¶] (c) the circumstances by which the Assureds first become aware thereof, [¶] then any Claim made subsequently arising out of such Wrongful Act shall be deemed for the purposes of this Coverage Section to have been made at the time such notice was first given to Underwriters. [¶] 3. Notice of [*sic*] Underwriters shall be given to the firm shown under Item G. of the Declarations for this Certificate."

Appellants did not purchase the "Optional Extension Period" coverage. Consequently, they were covered through July 1, 2002, and their reporting deadline was August 30, 2002.

On April 25, 2002, ZF Micro initiated an action against National Semiconductor Corp. National Semiconductor filed a cross-complaint on May 28, 2002. Appellants became aware of the cross-action "as of" June 2002, but they did not report it until

September 3, 2002, four days past the reporting deadline. David Feldman, president and chief executive officer (CEO) at ZF Micro, explained by declaration that he "quite frankly" was unaware of the reporting deadline because that term was not on the cover page or in the insuring clause, and he had not read page four, the last half-page where the provision was located. He believed that forfeiture of insurance benefits would be "extremely harsh," and he could see "no manner in which the late notice caused any damage to [Underwriters]."

Underwriters denied coverage on September 25, 2002, citing appellants' failure to provide timely notice of the National Semiconductor cross-action. On April 25, 2003, National Semiconductor filed a first amended complaint, which appellants tendered to Underwriters on March 9, 2004. Underwriters again denied coverage.

Appellants filed the instant action against Underwriters and others on August 19, 2004, asserting breach of contract and breach of the covenant of good faith and fair dealing and requesting a declaration that Underwriters owed a duty to defend and indemnify appellants. Underwriters moved for summary judgment or alternatively, summary adjudication. In their opposition, appellants argued that because the reporting requirement was not presented on the first page or the insuring clause, it was not "plain and conspicuous" and therefore should not be enforced. Because the requirement was located only in the main body, in 8- or 9-point font size, the policy appeared to "be intentionally designed to invite noncompliance and forfeiture of policy benefits." Alternatively, appellants argued that any defects in notice should be equitably excused, in light of Feldman's unawareness of the inconspicuous condition and its "questionable validity."

The superior court disagreed, however. On May 27, 2009, the court granted the motion for summary judgment based on appellants' failure to provide timely notice of the underlying claim. The court further found "no basis in law or fact to equitably excuse

compliance with the reporting deadline. Plaintiffs have failed to meet their burden to present evidence raising a triable issue of material fact sufficient to defeat the motion." Appellants filed a notice of appeal from the court's May 27 order.

Discussion[2]

1. Appealability

The appellate record contains an order granting summary judgment, but it does not include a separate judgment. "[A]n order granting summary judgment is not an appealable order. [Citations.] The appeal must be taken, instead, from a judgment entered on the basis of the summary judgment order." (*Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) Underwriters, however, have not moved to dismiss the

[2] As we are pointedly advised at the outset, "Underwriters were erroneously sued and served in the Coverage Action as 'Underwriters at Lloyd's, London,' and are erroneously referred to in Appellants' Brief as 'Lloyds' and in the singular." It is evident that asserted error originated in the certificate of insurance, which listed "Underwriters at Lloyd's, London" as the insuring party. The word "certain" appears on the cover page, in lowercase letters. The Insurers were subsequently identified in the policy as "those individual Underwriters at Lloyd's London whose names can be ascertained as hereinbefore set forth." Defendants identify themselves (in the plural) as "Certain Underwriters at Lloyd's London, Signatories to Certificate Number 9009554" (the same way they were named in the complaint, with the addition of "Certain"). In their motion below defendants referred to themselves both as "defendant" and as "defendants." Appellate court opinions are grammatically varied in their references to Certain Underwriters at Lloyd's, London. (See, e.g., *Akin v.Certain Underwriters At Lloyd's London* (2006) 140 Cal.App.4th 291 [referring to Underwriters as singular defendant in the singular in title, plural in text]; see also *Qualcomm, Inc. v. Certain Underwriters At Lloyd's, London* (2008) 161 Cal.App.4th 184 [alternately using both singular and plural].) Some, like appellants here, use "Lloyd's" in the singular. This is not error but an adopted convention. (See, e.g., *Nissel v. Certain Underwriters at Lloyd's of London* (1998) 62 Cal.App.4th 1103; *Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London* (1995) 34 Cal.App.4th 554.) Setting aside Underwriters' gratuitous criticism of appellants' usage, in the interest of consistency we will refer to Underwriters in the plural. (Cf. *Boghos v. Certain Underwriters At Lloyd's Of London* (2005) 36 Cal.4th 495 [referring to defendants in the plural as "The Underwriters"]; *Certain Underwriters v. Engs Motor Truck Co.* (1982) 135 Cal.App.3d 831 [plural].)

appeal, and in the interests of justice and to avoid delay, we construe the order granting summary judgment as incorporating an appealable judgment in favor of Underwriters only. (*Id.* at pp. 761-762; *Slater v. Lawyers' Mutual Ins. Co.* (1991) 227 Cal.App.3d 1415, 1418, fn 1.)

2. Standard and Scope of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) Summary judgment is properly granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "Summary judgment is an appropriate vehicle to determine coverage under an insurance policy when it appears there is no material issue of fact to be tried and the sole issue before the court is one of law." (*Pepper Industries, Inc. v. Home Ins. Co.* (1977) 67 Cal.App.3d 1012, 1017; accord, *Slater v. Lawyers' Mutual Ins. Co., supra,* 227 Cal.App.3d at p. 1419.) "We apply a de novo standard of review to an order granting summary judgment when, on undisputed facts, the order is based on the interpretation or application of the terms of an insurance policy." (*Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414.)

3. The Notification Clause

"[U]nder California law, ' "an insurer has a right to limit the policy coverage in plain and understandable language, and is at liberty to limit the character and extent of the risk it undertakes to assume . . . ." ' " (*Merrill & Seeley, Inc. v. Admiral Ins. Co.* (1990) 225 Cal.App.3d 624, 630.) Nevertheless, "to be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.' [Citation.] Thus, any such limitation must be placed and printed so that it

will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the average layperson. [Citations.] The burden of making coverage exceptions and limitations conspicuous, plain and clear rests with the insurer." (*Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204.) "This rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.)

"Courts have invalidated exclusions under the conspicuous requirement where (1) they are not included under the exclusion section and are placed on an overcrowded page; (2) they are included in a 'General Limitations' section but in a dense pack format; or (3) they are hidden in fine print in a policy section bearing no clear relationship to the insuring clause." (*Merrill & Seeley, Inc. v. Admiral Ins. Co., supra,* 225 Cal.App.3d at pp. 630-631, citing *Cal-Farm Ins. Co. v. TAC Exterminators, Inc.* (1985) 172 Cal.App.3d 564, 577.) "Therefore, not only must the language of exclusionary or limiting clauses be plain and clear, but also, the clause itself must be placed conspicuously in the contract to protect the insured's reasonable expectation of coverage." (*Thompson v. Mercury Cas. Co.* (2000) 84 Cal.App.4th 90, 95; *TIG Ins. Co. of Michigan v. Homestore, Inc.* (2006) 137 Cal.App.4th 749, 760.)

A claims-made policy is identified by the promise of the carrier to " 'assume liability for any errors, including those made prior to the inception of the policy as long as a claim is made during the policy period.' " (*Pacific Employers Ins. Co. v. Superior Court* (1990) 221 Cal.App.3d 1348, 1356-1357.) " 'Claims made' policies beneficially permit insurers more accurately to predict the limits of their exposure and the premium needed to accommodate the risk undertaken, resulting in lower premiums than are charged for an occurrence-based policy." (*Montrose Chemical Corp. v. Admiral Ins. Co.*

(1995) 10 Cal.4th 645, 689, fn. 24; see also *Pacific Employers Ins. Co. v. Superior Court*, *supra*, 221 Cal.App.3d at pp. 1359-1360 [insurer can underwrite risk and compute premiums with more certainty, while insured obtains more available and less expensive policy].) "Claims-made policies can be further classified as either *claims-made-and-reported policies*, which require that claims be reported within the policy period, or general claims-made policies, which contain no such reporting requirement." (*Pension Trust Fund for Operating Engineers v. Federal Ins. Co.* (9th Cir. 2002) 307 F.3d 944, 955.)

The policy at issue is denominated a claims-made policy: it covers the insured for liability when a third-party claim is made against the insured during the policy period. ZF Micro, however, contends that what it obtained is in reality a claims-made-and-reported policy, but without the necessary *conspicuous* language informing the insured that it must notify the insurer within a specified period in order to obtain the promised coverage.

A claims-made policy with a reporting deadline, however, need not be identified specifically as a claims-made-and-reported policy. Claims-made policies typically have a notification clause, often requiring the insured to report the claim *during* the policy period. (See, e.g., *Slater v. Lawyers' Mut. Ins. Co.* (1991) 227 Cal.App.3d 1415, 1419-1421; *KPFF, Inc. v. California Union Ins. Co.* (1997) 56 Cal.App.4th 963, 968.) Others, as in the case before us, provide an extended period in which to report the claim.[3] (See,

[3] Dispelling the notion that "a report is essential to the functioning of every claims-made format," one commentator has noted, "Some require only that notice of a claim be given 'as soon as practicable,' others that the notice be given within 60 days of the claim, still others that the notice be given as soon as practicable but in no event more than 60 days after the end of the policy period. For such formats, there seems to be no reason not to take the insurer at its word." (Works, Excusing Nonoccurrence Of Insurance Policy Conditions In Order To Avoid Disproportionate Forfeiture: Claims-Made Formats As A Test Case, 5 Conn. Ins. L.J. 505, 642 (1998-1999).)

e.g., *Westrec Marina Management, Inc. v. Arrowood Indem. Co.* (2008) 163 Cal.App.4th 1387, 1394 [claim to be made during policy period and reported within 30 days after expiration].) In *Pacific Employers, supra,* 221 Cal.App.3d 1348, the court referred to the document at issue as a "claims made" policy, although the insured's duty to report the claim during the policy period was stated in Section I, "Coverage," as well as the subsequent "Claims Made" section. (*Id*. at p. 1355-1356; cf. *Yancey v. Floyd West & Co.* (1988) 755 S.W.2d 914, 914-921 [referring to policy with reporting condition as "claims made"].) Likewise, in *KPFF, Inc. v. California Union Ins. Co., supra,* 56 Cal.App.4th at page 972, the court described the policy as "claims-made" although a covered claim had to be reported during the policy period. There can be no question that whether it is called "claims-made" or "claims-made-and-reported," appellants' policy required notification within a defined period. (Cf. *Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 888 ["Whatever label one wishes to use . . . this policy contains a reporting element essential to coverage"].)

"In determining whether an insurance policy provides reasonable notice of a lawful limiting provision, we assume the insured reads the entire policy." (*Haynes v. Farmers Ins. Exchange, supra,* 32 Cal.4th at p. 1217 [dis. opn of Baxter, J.], citing *Fields v. Blue Shield of California* (1985) 163 Cal.App.3d 570, 578 [insured has duty to read the policy].) In this case, however, the president and CEO of ZF Micro admitted that he had not read the entire policy, or even the entire coverage section applicable to the current situation. More specifically, he had not read subsection E of the "Directors and Officers and Assured Organization" coverage section, marked "NOTIFICATION."

Presumably Feldman did read the Declarations page and the first sentence of the "General Terms and Conditions." Those provisions alerted the reader to the specific coverage section applicable to each insurance situation. (Cf. *Merrill & Seeley, Inc. v. Admiral Ins. Co., supra,* 225 Cal.App.3d at p. 631 [policy passes conspicuous test, as

declarations page directs reader to policy for terms, but "better practice" is to spell out critical exclusions].) The entire "Directors & Officers and Assured Organization Coverage Section" was only three and a half pages. The reporting obligation on the last half-page was contained in its own paragraph, set apart from other subjects and adequately labeled with its own heading, "NOTIFICATION," in capital letters. The notification paragraph was a topic of equal prominence to the insuring clauses, definitions, exclusions, and limits of liability. There were only three sentences under "NOTIFICATION," the first of which clearly stated the requirement of 60 days' written notice as a "condition precedent to their rights to payment under this Coverage Section only." The font of the text was the same as the rest of the policy.

Accordingly, assuming that the obligation to notify the insurer is deemed to be an exclusion or limitation comparable to noncovered persons or acts, we believe the policy at issue set forth the disputed term in sufficiently conspicuous print and location.[4] Perfect drafting is not required; nor must the limiting provision be stated in the Declarations section or the insuring clause. (*Zubia v. Farmers Ins. Exchange* (1993) 14 Cal.App.4th 790, 795-796.) In *Zubia*, for example, a reimbursement provision was deemed sufficiently conspicuous even though it was located on page five of the policy. It did not matter that Part III of the policy, the "medical expense coverage provisions," did not expressly refer to the reimbursement provision contained in Part V. (*Id*. at p. 796.) The

[4] The reporting requirement is comparable to the provision examined in *Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co. of Pittsburgh* (N.D. Cal. 2007) 2007 WL 2506458 1, 4. There the plaintiff argued that the disclaimer at the top of the declarations identified the policy as a claims-made policy but did not mention the 60-day reporting provision. The district court found the notice requirement sufficiently clear and conspicuous: It appeared in the 16-page declarations section setting forth the general reporting requirements; the text was the same size font as the other declaration language; the pages were not densely printed; and the individual sections were set off. "Any reasonable insured, in determining how and when to report a claim, should have noticed the sixty-day provision and understood its operation." (*Ibid*.)

policy was only six pages long, the provision was written in same typeface as other provisions, and it was placed under a subheading called "Our Right to Recover Payment," under a descriptive heading " 'Part V-CONDITIONS,' " printed in boldfaced type like the other headings of the policy. (*Ibid*.) Accordingly, the disputed provision was held to be conspicuous as a matter of law. (See also *Estate of Murphy* (1978) 82 Cal.App.3d 304, 307-308 [endorsement reducing the policy's coverage effective though not referenced on declarations page].)

Jauregui v. Mid-Century Ins. Co. (1991) 1 Cal.App.4th 1544, and *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709 (*Ponder*) do not help appellants. Both portray defective clauses located in paragraphs labeled with headings unrelated to the content of the clause. In *Jauregui* the permissive user limitation did not appear in either the "Exclusions" subsection or the "Limits on Liability" subsection. Instead, it appeared under "Other insurance," although the limitation had "nothing to do with insurance from any other source." Similarly, the provision invalidated in *Ponder*, an exclusion for temporomandibular joint syndrome, was buried on a page with numerous headings and subheadings, thus giving "new meaning to the words 'dense pack.' " (*Ponder*, *supra*, 145 Cal.App.3d at p. 722.) Moreover, as in *Jauregui*, the exclusionary clause appeared under a paragraph labeled "Dental Care." (*Ibid*.) Thus, it was "difficult to characterize as 'conspicuous' an exclusion . . . located under a subheading whose ordinary meaning does not encompass the condition purportedly excluded." (*Id*. at p. 723.) Likewise, in *Thompson v. Mercury Cas. Co., supra*, 84 Cal.App.4th at page 97, the "permissive user coverage" provision was not "bolded, italicized, enlarged, underlined, in different font, capitalized, boxed, set apart, or in any other way distinguished from the rest of the fine print."

Here, by contrast, the disputed provisions were appropriately set forth in their own subsection, clearly identified by its distinctive subheading whose ordinary meaning

encompassed the condition appellants needed to observe. If appellants believed they had unlimited time to report National Semiconductor's claim, that belief was unreasonable.

4. Equitable Excusal

Appellants alternatively seek a determination that they should be excused from "strict compliance" with the reporting condition to avoid forfeiture. Citing *Root v. American Equity Specialty Insurance Co.* (2005) 130 Cal.App.4th 926 (*Root*), appellants contend that the provision is "largely a trap door designed to cause forfeiture."

Root does not offer a comparable basis to escape the notification condition. There the insured was an attorney whose former client filed a malpractice action against him three days before his malpractice insurance expired. The plaintiff was not served with the malpractice suit until after the policy expired, but on the day the suit was filed he received a phone call from someone who identified herself as an employee of a "legal journal" seeking the plaintiff's reaction to the lawsuit. Thinking the phone call might be a prank, the plaintiff did not report the claim to the insurance company. Two days later he left for a weekend vacation. The day the plaintiff returned, he read about the lawsuit in the same "legal journal," and he immediately notified the carrier of the claim. (*Id*. at p. 931.) By this time it was two days after the policy expired. The appellate court overturned the summary judgment, finding it appropriate to excuse the plaintiff's failure to report the claim before the policy expired. The court noted that where the term functions as a condition precedent rather than "an element of the fundamental risk insured," equitable excusal may be applicable when it otherwise would work a forfeiture. (*Id.* at pp. 942-943.) Emphasizing "the narrowness of [its] decision," the court found it significant that the insurer had presumably not offered the plaintiff the opportunity to buy an extended reporting endorsement, which would have given him an extra 60 days to report a claim. (*Id.* at pp. 933, 948.) "Had Root been given that opportunity . . . equity might not require excuse of the condition, because its excuse would, in effect, be to give

Root the benefit of something that he had the opportunity to buy and passed up." (*Id*. at p. 948; compare *Slater v. Lawyers' Mutual Ins. Co., supra,* 227 Cal.App.3d at p. 1424 [reporting provisions not unfair where insured declined opportunity to purchase extended reporting period endorsement].)

The equitable excusal of conditions is a "flexible and nuanced" concept (*Root, supra,* 130 Cal.App.4th at p. 947), and "the factually intense nature of the inquiry may make summary judgment more difficult for insurers to obtain in certain cases . . . ." (*Id.* at p. 948.) As the *Root* court remarked, "Equities vary with the peculiar facts of each case. *Sometimes--indeed most of the time--it will not be equitable to excuse the non-occurrence of the condition, so it is not excused*." (*Id*. at p. 948, italics added.)

Appellants cite no facts to support equitable excusal other than the assertedly inconspicuous location of the provision and the tardiness of only four days past the compliance period. As we have already concluded, however, the reporting requirement was sufficiently conspicuous; appellants had only to read the last half-page of the three-and-one-half-page coverage section to have noticed it. While it is true that they were only four days past the August 30, 2002 deadline, they were aware of National Semiconductor's cross-complaint in June 2002. Thus, there was more than enough time to report the claim. Unlike Root, who alerted his insurer the very day he learned of the suit, appellants delayed notifying Underwriters during the rest of June and all of July and August. (Cf. *Charles Dunn Co., Inc. v. Tudor Ins. Co.* (9th Cir. 2009) 308 Fed.Appx. 149, 151, 2009 WL 117868, 2 [three-month delay not excused where insured had nine business days to report claim]; see also *Thoracic Cardiovascular Associates, Ltd. v. St. Paul Fire and Marine Ins. Co.* (Ariz. App. 1994) 181 Ariz. 449, 455, 891 P.2d 916, 922 [rejecting impossibility or impracticability excuse for untimely notice, as it would "essentially convert claims made policies into occurrence policies," as notice was material part of claims-made policy].) Also unlike Root, appellants were offered an

optional extended reporting period, which they declined to purchase. (Cf. *Slater v. Lawyers' Mutual Ins. Co.*, *supra*, 227 Cal.App.3d at p. 1424 [reporting provisions not unfair where insured declined opportunity to purchase extended reporting period endorsement].) As appellants offered no circumstances that would justify excusal as a matter of equity, the superior court did not err when it rejected this theory and granted summary judgment.

Disposition

The summary judgment order, construed to incorporate a judgment in favor of Underwriters, is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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McADAMS, J.